2015

State of Utah, Appellee v. Michael L. Nay and Tracy L. Hanson, Appellants : Brief of Appellee

Utah Court of Appeals

Case No. 20141185-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL L. NAY & TRACY L. HANSON,
Defendants/Appellants.

Brief of Appellee

Appeal from convictions for production of a controlled substance, a third degree felony; possession of a controlled substance with intent to distribute, a third degree felony; possession of drug paraphernalia, a Class B misdemeanor; and possession of a firearm by a restricted person, a third degree felony, in the Sixth Judicial District, Sevier County, the Honorable Wallace A. Lee presiding

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STATEMENT OF JURISDICTION

Defendants Michael L. Nay and Tracy L. Hanson appeal from convictions for production of a controlled substance, a third degree felony; possession of a controlled substance with intent to distribute, a third degree felony; and possession of drug paraphernalia, a Class B misdemeanor. Hanson also appeals from a conviction for possession of a firearm by a restricted person, a third degree felony. This Court has jurisdiction under Utah Code section 78A-4-103(2)(e).

STATEMENT OF THE ISSUE

This appeal involves Defendants' challenge to the joinder of their cases for trial. When police executed a search warrant of Hanson's house, they found her smoking marijuana with her brother, Chad, and their cousin,

Nay. The police also found, among other things, three glass quart jars of marijuana in Nay's backpack; two large bags of marijuana that someone had been parceling into smaller bags using a digital scale; two guns, a small bag of marijuana, and a book on marijuana horticulture in Hanson's bedroom; and a marijuana plant growing in the basement. Hanson later confessed that she, Nay, and Chad were all involved in growing and preparing to sell marijuana. Chad pleaded guilty. At Nay and Hanson's joint trial, Hanson's confession was admitted and all three testified that Chad was solely responsible for the marijuana production, although Nay and Hanson did admit to smoking the marijuana.

Issue. Were Defendants prejudiced by being jointly tried where all the evidence admitted at their joint trial—including Hanson's confession—would have been admissible in separate trials?

Standard of Review. Given a trial court's "considerable latitude" in joinder decisions, a defendant must show "a clear abuse of discretion in that [the ruling] sacrifices the defendant's right to a fundamentally fair trial." *State v. Pierre*, 572 P.2d 1338, 1350 (Utah 1977). *See also State v. McGrath*, 749 P.2d 631, 633 (Utah 1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute and rules are reproduced in the addendum: Utah Code Ann. §77-8a-1 (West 2004); and Utah Rule of Evidence 801.

STATEMENT OF THE CASE[1]

Defendants challenge the joinder of their cases for trial. Defendants opposed the State's motion for joinder, arguing that they each had irreconcilable and mutually exclusive defenses and that Hanson's confession to the police would be inadmissible hearsay in a separate trial for Nay. R104, 131–34. The trial court granted the State's joinder motion, R148–49, and a jury convicted both defendants on all charges, R304:338–39.

A. Summary of facts.[2]

Armed with a search warrant, police entered Hanson's house. They found Hanson in the living room smoking marijuana with her brother, Chad, and their cousin, Nay. R304:277, 299–300.

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[1] The State will use "R" to refer to the record in Nay's case. To the extent the relevant filings and orders are identical in Nay's and Hanson's cases, the State will cite only to the record in Nay's case. When necessary, the State will use "R(Hanson)" to refer to the record in Hanson's case.

[2] Because this is an appeal from a jury verdict, the State presents the facts in the light most favorable to the verdict, addressing conflicting evidence only to the extent necessary to understand the issue on appeal. *See State v. Bond*, 2015 UT 88, ¶3 n.2, 361 P.3d 104.

Police found in the same room a grinder with marijuana residue; rolling papers for joints; a corked vase with marijuana inside; a digital scale in a carrying case that also contained a marijuana pipe; two blue bowls with marijuana residue; and two roughly gallon-sized plastic bags of marijuana, one of which had the marijuana apportioned among twelve smaller bags. R303:23–24, 32–33, 38, 41–47, 50; State's Ex4. They also found Nay's backpack, which had three glass quart jars of marijuana. R303:24.

In Hanson's bedroom, the police found two guns, a small amount of bagged marijuana in her dresser, and, near her bed, a book entitled *Marijuana Horticulture: The Indoor/Outdoor Medical Grower's Bible*. R304:14, 17, 21, 25, 32–33; State's Ex14.

On the kitchen table, the police found marijuana in a paper bag. In a kitchen drawer, they found about two more ounces in a plastic bowl. R304:6–7, 11, 136–37, 140.

The lead officer on the case, Detective Dwight Jenkins, noticed potting soil and several jugs of fertilizer near the back door but thought nothing of it until he reached the basement—a small boiler room and coal room accessed by a hatch cut into the floor near the back door. R304:36–39, 328, 332; State's Ex 16. There, Detective Jenkins found a live marijuana plant, three to four feet tall, growing in a pot under a fluorescent light.

R304:43, 49. Reflective foil covered the wall, and a heater and fan sat nearby. R304:43, 51. On the floor were three dead, drying marijuana plants. R304:50.

The police arrested Nay, Hanson, and Chad and informed them of their *Miranda* rights. R304:68. Detective Jenkins interviewed Hanson at the jail after reminding her of her *Miranda* rights. R304:71. Hanson "was calm and collected," "seemed coherent," and "was in control of her faculties and knew what was happening." R304:71–72, 110. Hanson confessed that she, Nay, and Chad had all been "trying their hand at growing marijuana." R304:74. She said that Chad "helped a little" but was not very good at it, so she and Nay "did the bulk of the work." R304:74–75. Hanson said that Nay and Chad got a couple pounds of marijuana from someone else and, when the police entered the house, they had been weighing and preparing it for all three of them to sell. R304:74, 76–77.

B. Summary of proceedings.

The State charged Nay, Hanson, and Chad with several drug-related offenses. After Chad pleaded guilty, the State moved to join Nay's and Hanson's cases for trial. R104–11. Nay and Hanson opposed the motion. They conceded that the allegations related to the same act or criminal episode. R133–34. But they argued that their defenses were irreconcilable

and mutually exclusive under the assumption that Hanson's defense would consist of her confession, which implicated Nay. R131-33. The trial court rejected their argument, stating that Hanson's confession could not be considered her "defense"; therefore, the co-defendants' defenses would not be irreconcilable or mutually exclusive. R148-49. Defendants also argued that Hanson's confession was hearsay and, while admissible in a separate trial for her, would be inadmissible in a trial against Nay. R133. The trial court rejected that argument, stating that Hanson's confession would be admissible in Nay's trial as a prior inconsistent statement. R149.

At a joint jury trial, Detective Jenkins and other officers testified to what they found during the search. Detective Jenkins also testified without objection to what Hanson told him in the interview at the jail. R304:69-77.

Chad testified for the defense, stating that he alone was responsible for growing the marijuana, bringing the bagged marijuana to Hanson's house, and weighing it to prepare for sale—though he occasionally slipped and referred to "we" before correcting himself. R304: 218-26, 231. He stated that he had a key to Hanson's house and that he would go there to tend to the marijuana plant while she was at work, but that as soon as Hanson found out about it, she insisted that he remove it from her house. R304:227-29. Chad said he was making arrangements to do that. R304:228.

But when asked how Nay and Hanson reacted to him weighing out the marijuana to sell, Chad said the others "were just there smoking it." R304:234-35. And when the police showed up, Chad said, he put the jars of marijuana in Nay's backpack. R304:221.

Nay also testified. He claimed the backpack as his own but denied ownership or knowledge of the marijuana in it and denied any wrongdoing except for smoking marijuana that evening. R304:270-77. Nay also testified that Chad was solely responsible for the marijuana. R304:276. He stated that when Chad took out the marijuana and started weighing and bagging it, Hanson "seemed a little hesitant" and "a little uncomfortable," but she "didn't voice any objections." R304:290.

Hanson took the stand as well. She testified that she did not remember being interviewed or—if she was—what she said to the police, perhaps because of the stress of the situation and the effect of the marijuana. R304:296-99, 308-09. But she denied the truth of the confession, stating that Chad was solely responsible for the marijuana and that all she did was smoke it that evening. R304:299-306. She testified that she had not given Chad a key and that he must have found her hidden spare key. R304:312-13. She said that when she arrived home from work that night, Nay and Chad were outside her house waiting for her to let them in. R304:311-13.

Although she testified to being surprised to see them because she had not spoken to Chad that day, R304:312, Chad had testified that he called her earlier that day to see when she would be getting off work, R304:231.

Hanson testified that, once inside, she got upset when Chad took out the bags of marijuana. R304:314–15. She told him to take his marijuana and leave, but he refused and began gathering things to weigh the marijuana. R304:315–16. Hanson said that she got increasingly upset as they argued, and she moved from room to room cleaning things as a way to channel her frustration. R304:315–19. Hanson calmed down when Chad got her to smoke a joint. But she continued to protest, using *Marijuana Horticulture*—which she said Chad had brought and set on the coffee table while they were smoking—to point out the possible penalties they could face.[3] R304:306, 318, 323–24. Hanson also testified that she did not know about the marijuana growing in her basement until a day or two before the police showed up. R304:325.

The jury convicted Nay and Hanson of production of a controlled substance, possession of a controlled substance with intent to distribute, and

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[3] Hanson testified that she must have taken the book into her bedroom—where the police found it—as she moved from room to room in her agitated state. R304:323–24.

possession of drug paraphernalia. R239–40; R(Hanson):248–49. It also convicted Hanson of possession of a firearm by a restricted person. R(Hanson):248–49. The court sentenced Nay to two concurrent prison terms of 0 to 5 years and one concurrent jail term of 6 months. R288–89. The court suspended the prison and jail terms and ordered Nay to serve 36 months on probation, which included serving 45 days in jail. R288. The court imposed total fines of $11,000, suspending all but $950. R288. Hanson received the same sentence, plus an additional concurrent, suspended 0-to-5-year prison sentence and $5,000 fine for the firearm offense. R(Hanson)297–98. Defendants timely appealed. R292; R(Hanson)301.

SUMMARY OF ARGUMENT

Defendants argue that they were prejudiced by the joinder of their cases for trial. They do not challenge the sufficiency of the evidence, and other than joinder, they do not argue that any error—whether constitutional, evidentiary, or otherwise—warrants relief on appeal.

Joinder of co-defendants' cases for trial turns on a two-pronged analysis. The first prong looks at the nature of the co-defendants' participation in the criminal activity. The second looks at whether joinder would prejudice any party. Defendants challenge only the second prong, arguing that they were prejudiced by the admission of evidence at their

joint trial that—according to them—would have been inadmissible in separate trials. But Defendants were not prejudiced because all the evidence admitted at the joint trial would have been admissible in separate trials.

Specifically, Nay asserts that he was prejudiced by a joint trial because Hanson's confession would have been excluded in a separate trial as inadmissible hearsay. But in light of her trial testimony, Hanson's confession was a prior inconsistent statement. It was thus admissible against both Nay and Hanson as non-hearsay under rule 801(d)(1)(A), Utah Rules of Evidence, whether or not they were tried together. The trial court was thus well within its discretion to join the cases for trial.

For the first time on appeal, Nay argues that he was also prejudiced by joinder because the Confrontation Clause would have barred Hanson's confession from being introduced in a separate trial against Nay. Both Defendants argue—also for the first time on appeal—that they were prejudiced by joinder because each other's testimony would have been excluded against the other in separate trials under rules 402 and 403, Utah Rules of Evidence, as irrelevant, unduly confusing, and misleading to the jury.

This Court should not reach these new arguments because Defendants have not acknowledged that they forfeited them by not raising them below, and they have not briefed any exception to the preservation rule.

But even under plain error review, Defendants' remaining arguments would fail. First, the Confrontation Clause does not forbid using the out-of-court statement of a witness who testifies at trial. Defendants offer nothing to show that Hanson could not or would not have testified just as she did at the joint trial. Although Nay argues that Hanson's claimed lack of memory about the confession would impede his ability to cross-examine her in a separate trial, U.S. Supreme Court precedent squarely forecloses that argument: A testifying witness's faulty memory does not render inadequate the right to cross-examine that witness. Thus, failing to sever the trials on this basis was not error, let alone an obvious one.

Defendants' second unpreserved argument fares no better. Defendants have not shown how their testimonies—which were largely consistent in disclaiming responsibility for the drugs and casting the entire blame on Chad—were irrelevant to each other or so confusing and misleading that they would have been excluded under rules 402 or 403 in

separate trials. Thus, they again have not shown obvious error in trying them jointly.

Finally, there is no reasonable likelihood of a different result if the trials had been severed. The evidence against both Defendants was overwhelming. When the police executed the search warrant, they found marijuana all over Hanson's house. Defendants admit that they were smoking marijuana. Chad—at least—was weighing and parceling marijuana into smaller bags to sell, and Defendants implicitly admit that they were aware of what he was doing. The police found three large jars of marijuana in Nay's backpack and marijuana in Hanson's bedroom dresser and kitchen drawers and growing in her basement. On this evidence, Nay would have been convicted even if Hanson's confession had not come in. And Hanson would have been convicted regardless of whether Nay testified. More importantly, excluding each other's testimony would not have helped them where—like Chad—they all corroborated each other's stories and blamed everything on Chad.

In sum, Defendants have not shown that the trial court abused its discretion in jointly trying them.

ARGUMENT

DEFENDANTS CANNOT SHOW THAT THEY WERE PREJUDICED BY THEIR JOINT TRIAL BECAUSE ALL THE EVIDENCE ADMITTED AT THAT TRIAL WOULD HAVE BEEN ADMISSIBLE IN SEPARATE TRIALS.

Joinder of co-defendants' cases for trial is appropriate when (1) the charges could have been joined in a single information because the co-defendants allegedly participated in the same criminal act, conduct, or episode, and (2) no party would be prejudiced by the joinder. Utah Code Ann. §77-8a-1 (West 2004). But a defendant is not prejudiced by the evidence presented at a joint trial when that evidence would also be admissible in separate trials. *Cf. Zafiro v. United States*, 506 U.S. 534, 539 (1993) (discussing the converse rule—that prejudice "might" result from evidence "probative of a defendant's guilt but technically admissible only against a codefendant" being used in a joint trial).

Defendants concede that the charges filed against them could have been joined in a single information, thus satisfying the first step in the joinder analysis. Aplt. Br. at 39. They challenge only the trial court's conclusion as to prejudice arising from joinder. Nay argues that Hanson's statement to Detective Jenkins, in which she admitted responsibility and directly implicated Nay and Chad, would have been inadmissible hearsay

in a separate trial, and that a joint trial thus prejudiced him. Aplt. Br. at 36–39. Nay alternatively argues—for the first time on appeal—that Hanson's confession also would have been inadmissible in a separate trial against him under the Confrontation Clause. Aplt. Br. at 27–36. Both Defendants further assert—also for the first time on appeal—that rules 402 and 403, Utah Rules of Evidence, would have precluded them from testifying in each other's trials.[4]

Only Nay's hearsay argument is preserved. And he cannot prevail on it because Hanson's confession was not hearsay: Given her testimony at trial, the confession qualified as a prior inconsistent statement. Because the statement would have been admissible in separate trials, Nay cannot show that he was prejudiced by the joint trial or that there was a reasonable likelihood of a more favorable outcome had the trial court denied the State's joinder motion.

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[4] Defendants' brief generally does not differentiate between arguments asserted on behalf of each client. However, the hearsay and Confrontation arguments logically apply only to Nay's appeal. As Hanson conceded before the trial court, her confession would be admissible in her separate trial. R(Hanson)133. *See also* Utah R. Evid. 801(d)(2)(A) (providing that an out-of-court statement is not hearsay if "offered against an opposing party" and "made by the party in an individual or representative capacity").

This Court should not reach Defendants' remaining arguments because they are unpreserved and Defendants argue no exception to the preservation rule. In any event, the remaining arguments would fail under plain error review. Just as the Confrontation Clause did not exclude Hanson's confession in the joint trial, it would not have excluded it in a separate trial. And, contrary to Nay's argument, a witness's claimed memory loss does not render inadequate the opportunity to cross-examine the witness. Nor would rules 402 and 403 have precluded Defendants from testifying in the other's separate trial, particularly where both testified consistently that Chad was the sole producer and distributor of the marijuana. In other words, all the evidence admitted in the joint trial would be admissible in separate trials. Thus, Defendants' unpreserved claims do not show that they were prejudiced by joinder of their cases for trial.

But more importantly, given the overwhelming evidence of their guilt, Defendants have not shown that they would have fared better in separate trials, even if Hanson's confession would have been inadmissible in a separate trial against Nay, and even if they did not testify in each other's trials.

A. To defeat joinder, Defendants must show that evidence admitted in the joint trial would be inadmissible in separate trials.

When a court considers joining two or more defendants' cases for trial, its analysis involves a participation and a prejudice prong. Under the participation prong, the court considers whether Defendants initially "could have been joined in a single indictment or information." Utah Code Ann. §77-8a-1(3)(a). Multiple defendants may be joined in a single indictment or information "if they are alleged to have participated in the same act or conduct or in the same criminal episode." *Id.* §77-8a-1(2)(b). Defendants concede that their cases meet that standard. Aplt. Br. at 39.

Under the prejudice prong, the court must consider whether "a defendant or the prosecution is prejudiced . . . by a joinder for trial together." *Id.* §77-8a-1(4)(a). If so, "the court shall . . . grant a severance of defendants, or provide other relief as justice requires." *Id.* Although "[d]oubts concerning prejudice should be resolved by the trial court in favor of a defendant," *State v. Collins*, 612 P.2d 775, 777 (Utah 1980), trial courts have "considerable latitude" in selecting the appropriate relief based on their weighing of prejudice "against considerations of economy and expedition in judicial administration," *State v. Pierre*, 572 P.2d 1338, 1350 (Utah 1977). Reversal of a trial court's ruling on a motion to join or sever,

therefore, is appropriate only when "it is affirmatively shown that a defendant's right to a fair trial has been impaired." *Collins*, 612 P.2d at 777. Furthermore, "[a]ny error in denying severance will be deemed harmless unless defendant can establish a reasonable likelihood of a more favorable outcome if the court had granted a severance." *State v. Calliham*, 2002 UT 86, ¶34, 55 P.3d 573 (internal quotation marks omitted); *see also State v. Velarde*, 734 P.2d 440, 445 & n.10 (Utah 1986); *State v. Jaimez*, 817 P.2d 822, 825 (Utah Ct. App. 1991).

When, as here, claims of prejudice focus on admissibility, there can be no prejudice when all the evidence admitted at trial would be admissible in separate trials as well. Prejudice may indeed arise when evidence admissible against one defendant but inadmissible against the other is admitted in a joint trial. *See Velarde*, 734 P.2d at 445 (assessing prejudice by examining "evidence that might have been different or unavailable at a separate trial"); *see also Kansas v. Carr*, 136 S. Ct. 633, 644–45 (2016) (stating in joint death penalty proceeding that admitting evidence that would be inadmissible in separate proceedings may implicate due process); *Zafiro*, 506 U.S. at 539 ("Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice."). Similarly, prejudice may also arise when a confession by one

defendant directly implicates a co-defendant and the protections of the Confrontation Clause are not satisfied. *See Calliham*, 2002 UT 86, ¶¶40–46 (concluding that defendant's right to confrontation was violated in joint trial but that error was harmless). But when all the evidence presented at a joint trial would also be admissible in separate trials, there can be no prejudice.[5]

Even when evidence would be inadmissible in separate trials, severance is not automatic. *See* Utah Code Ann. §77-8a-1(4)(a) (stating that in face of prejudice, "the court shall . . . grant a severance of defendants, *or provide other relief as justice requires*" (emphasis added)); *Calliham*, 2002 UT 86, ¶¶35–37 (approving use of limiting instructions to protect against prejudice in joint trial so long as evidence does not give rise to Confrontation Clause problems); *State v. O'Brien*, 721 P.2d 896, 898 (Utah 1986) (stating that doubts should be resolved in favor of severance, but acknowledging that "possible prejudice" should be weighed against "considerations of economy and practicalities of judicial administration"); *see also Carr*, 136 S. Ct. at 645 ("The mere admission of evidence that might

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[5] In theory, there are other grounds that could establish prejudice from joinder, such as irreconcilable and mutually exclusive defenses. *E.g.*, *Velarde*, 734 P.2d at 445. But Defendants have abandoned any such claims on appeal and have focused exclusively on evidentiary and constitutional admissibility in separate trials.

not otherwise have been admitted in a severed proceeding does not demand the automatic vacatur of a death sentence."); *Zafiro*, 506 U.S. at 538–39 (stating that "risk" of prejudice "*might* occur" when evidence inadmissible against one co-defendant is admitted against another, and emphasizing that "even if prejudice is shown," the federal rule "leaves the tailoring of the relief to be granted, *if any*, to the district court's sound discretion" (emphases added)).

As shown below, Nay has not established prejudice on either an evidentiary or constitutional basis.

B. Because Hanson's confession was not hearsay, it would have been admissible in separate trials.

Hanson's confession was not hearsay because it meets the definition of non-hearsay in rule 801(d)(1)(A), Utah Rules of Evidence.[6]

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[6] Nay argues that admitting the alleged hearsay statement violated both the state and federal Due Process Clauses. Aplt. Br. at 36–39. He does not separately brief the state constitutional claim and has thus forfeited it. *State v. Worwood*, 2007 UT 47, ¶18, 164 P.3d 397 ("[C]ursory references to the state constitution within arguments otherwise dedicated to a federal constitutional claim are inadequate."). Nor did he argue due process before the trial court. To the extent he simply means that his "right to a fundamentally fair trial" has been impaired by the admission of the alleged hearsay, *Pierre*, 572 P.2d at 1350, the argument is properly before this Court. Regardless, because the confession was not hearsay and would not be hearsay in severed trials, as demonstrated below, joinder resulted in no error, constitutional or otherwise.

An out-of-court statement is not hearsay when (1) the declarant testifies, (2) the declarant is "subject to cross-examination" about the prior statement, and (3) either (a) the prior statement is "inconsistent with the declarant's testimony," (b) "the declarant denies having made the statement," or (c) the declarant "has forgotten." Utah R. Evid. 801(d)(1)(A).

Hanson's confession satisfies each condition. Hanson testified at trial and was subject to cross-examination about her confession.[7] According to her confession—admitted at trial through Detective Jenkins—Nay, Hanson, and Chad were all responsible for growing and preparing to distribute the

[7] Hanson testified in her own defense and was cross-examined by the State. Although Nay and Hanson were represented by the same attorney, Nay has not alleged a conflict of interest and has pointed to nothing that precluded him from fully challenging Hanson's prior statement through direct, re-direct, or, if need be, separate cross-examination. *Cf. Ohio v. Roberts*, 448 U.S. 56, 58, 70–71 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004) (concluding that defense counsel's direct examination of witness at preliminary hearing comported with the principal purpose of cross-examination in form and substance); *Nelson v. O'Neil*, 402 U.S. 622, 624 (1971) (finding no Confrontation Clause violation when co-defendant took stand in his own defense, even though defendant's counsel did not cross-examine co-defendant but was "fully free to do so"). Indeed, counsel in fact confronted Hanson about the out-of-court statement on direct examination and obtained testimony that was favorable to Nay. *Cf. Nelson*, 402 U.S. at 629 (noting that co-defendant's direct testimony regarding his alleged confession "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced").

marijuana. R304:74–77. In her trial testimony, Hanson said she could not remember making the statement or even speaking with Detective Jenkins. R304:298–99. She also stated that the substance of her confession was false and she testified extensively that Chad was solely responsible for the marijuana. R304:299–306. Her confession therefore qualified as non-hearsay both because her in-court testimony was inconsistent with the confession and because she could not remember making the out-of-court statement. *See* Utah R. Evid. 801(d)(1)(A).

As non-hearsay, the confession was admissible not only against Hanson as the declarant-witness, but also against Nay. For example, in *State v. King*, this Court concluded that some of the out-of-court statements of a defendant's accomplice—offered into evidence by the detective with whom she had spoken—were inconsistent with the accomplice's trial testimony and thus admissible in King's trial. 2012 UT App 203, ¶¶35–47, 283 P.3d 980. Furthermore, as non-hearsay, Hanson's confession was admissible as substantive evidence and not merely impeachment evidence. *See In re J.C.*, 2016 UT App 10, ¶28 n.9.[8]

[8] This Court issued *In re J.C.* after Defendants filed their opening brief.

Nay has presented no evidence suggesting any other outcome was reasonably likely in separate trials. In that sense, this case is akin to *State v. Jaimez*. There, this Court rejected Jaimez's claim that had separate trials been ordered, his co-defendant would have testified for Jaimez and presented exculpatory testimony. *See* 817 P.2d at 825–26. The Court explained that, given the co-defendant's refusal to testify in a joint trial, Jaimez could not show that his co-defendant was reasonably likely to testify in a separate trial or that he would present exculpatory testimony if he did. *Id.* Likewise, given Hanson's exculpatory testimony in the joint trial, Nay has not shown that it was reasonably likely that Hanson would *not* have testified at his separate trial. Nor has he shown that her testimony would have differed in a way that both favored Nay *and* rendered the out-of-court statement inadmissible. Hanson either would have testified in a manner consistent with her confession—in which case any error in the joint trial would be harmless—or she would have testified the same way she did in the joint trial—in which case the confession would be admissible as a prior inconsistent statement.

In sum, Nay has not demonstrated that he was prejudiced by joinder because all the evidence admitted at the joint trial would have been admissible in separate trials. Thus, his right to a fair trial was not infringed,

and there was no reasonable likelihood of a more favorable result had the trials been severed.

C. This Court should not review Defendants' remaining arguments because they did not preserve them and have not argued plain error; in any event, no error—plain or otherwise—occurred by joining the cases for trial.

Nay additionally argues that a joint trial prejudiced him because, had the trials been severed, Hanson's confession could not have been admitted against him without violating the Confrontation Clause. Aplt. Br. at 33, 35–36. Nay and Hanson also argue that they were prejudiced by joinder because each co-defendant's testimony was irrelevant to the other's culpability and would have confused or misled the jury. Aplt. Br. at 21–27.

Because Defendants failed to preserve these arguments and have not argued plain error on appeal, this Court should not address them. But even under a plain error analysis, Defendants' arguments fail. There was no Confrontation Clause violation, because Nay had the opportunity to cross-examine Hanson at trial and would have in a separate trial as well. Defendants' evidentiary arguments also are meritless because each co-defendant's testimony was relevant to determining the other's culpability and did not confuse or mislead the jury. Again, because all the evidence

admitted at the joint trial would be admissible in separate trials, Defendants suffered no prejudice by joining their cases for trial.

1. Defendants have forfeited their remaining, unpreserved arguments by failing to argue plain error before this Court.

In their opposition to the State's joinder motion, Defendants argued that Hanson's confession would be hearsay in Nay's separate trial and that the two had irreconcilable, mutually exclusive defenses. R131–34. They did not mention confrontation, relevance, rule 403, or any other reason that the two would be prejudiced by joinder. R131–34.

Defendants have not satisfied the standard for preserving their remaining arguments for appellate review. To preserve an issue for appeal, it "must have been presented to the district court in such a way that the court has an opportunity to rule" on the issue. *State v. Houston*, 2015 UT 40, ¶19, 353 P.3d 55, as amended (Mar. 13, 2015) (internal quotation marks omitted); *accord State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346.

That was not done here. Before the trial court, Defendants focused their admissibility arguments exclusively on the hearsay issue; they never mentioned other evidentiary rules, the Confrontation Clause, or even the issue of cross-examination. R131–34. Opposing joinder on one basis does not preserve an argument opposing joinder on another. *See Patterson v.*

Patterson, 2011 UT 68, ¶¶14–20, 266 P.3d 828 (noting that although appellate court will address new authority raised on appeal, it will not address new issues, claims, arguments, or matters absent some exception to the preservation rule). A contrary rule would violate "[n]otions of fairness" and judicial economy by "revers[ing] a district court for a reason presented first on appeal," without giving the opposing party a chance to counter the argument or the trial court an opportunity to rule on it. *Id.* ¶¶15–16. Because Defendants have not preserved the issues for appeal, this Court should not reach them. *Holgate*, 2000 UT 74, ¶11.

Under the plain error exception to the preservation rule, relief may be available if the appellant proves obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). But parties forfeit any right to plain error review by failing in their opening brief to "articulate an appropriate justification for appellate review" of any unpreserved arguments. *See State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551; *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995). For example, in *State v. Pham*, the defendant moved to sever his trial from his co-defendant's based on potential Confrontation Clause violations. 2015 UT App 233, ¶¶2–3, 6, 359 P.3d 1284, *cert. denied* 364 P.3d 48 (Utah 2015). But Pham abandoned that argument on appeal because his co-defendant testified; instead, he argued that he and his co-defendant

had antagonistic defenses. *Id.* ¶¶6–7. This Court declined to address Pham's new arguments because they were unpreserved and because Pham did not argue plain error until oral argument. *Id.*

This case is no different. Defendants did not give the trial court an opportunity to rule on the Confrontation Clause, rule 402, or rule 403. Nor have Defendants asserted any exception to the preservation rule, let alone articulated how those exceptions would justify relief on appeal. Because Defendants have doubly forfeited their remaining arguments, this Court should not address them.

2. Nay has not established any potential violation of the Confrontation Clause, let alone an obvious one.

In any event, Nay's first unpreserved argument lacks merit. He argues that he was prejudiced by joinder because admitting Hanson's confession in Nay's separate trial would violate the Confrontation Clause. He asserts that Hanson's confession was testimonial and that, in the severed trial, he would not have had an opportunity to cross-examine Hanson about her confession due to her inability to recall her interview with Detective Jenkins. Aplt. Br. at 27–36. For legal support, Nay relies primarily on

Crawford v. Washington, 541 U.S. 36 (2004), and *Bruton v. United States*, 391 U.S. 123 (1968).[9]

The State agrees that Hanson's confession was testimonial. But Nay was not denied the right to confront Hanson through cross-examination in the joint trial, nor would he have been in a separate trial. Because Hanson testified in the joint trial, admitting her out-of-court statement against Nay did not violate *Crawford* or *Bruton*. Nor can Nay show any reasonable likelihood that admitting her confession in a separate trial would have violated his confrontation rights. Furthermore, Hanson's faulty memory was no impediment to cross-examination. Rather, defense counsel used Hanson's faulty memory to draw out testimony favorable to Nay, as defense counsel likely would have done in a separate trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

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[9] Nay repeatedly refers to Hanson's confession as "an involuntary confession." Aplt. Br. at 35, 36, 37. But neither Defendant challenged the voluntariness of the confession below, nor have they questioned it on appeal, other than to offhandedly call it "involuntary." Such passing references are insufficient to carry an appellant's burden for an unpreserved claim on appeal. *See* Utah R. App. P. 24(a)(9); *State v. Sloan*, 2003 UT App 170, ¶15, 72 P.3d 138 (deeming inadequate the assertion of "legal conclusions with no legal analysis").

against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (concluding that the Fourteenth Amendment made the right of confrontation applicable to the states). The right of confrontation includes the right to cross-examine. *Pointer*, 380 U.S. at 404. In *Crawford*, the U.S. Supreme Court held that before "an *absent* witness's" testimonial statements could be admitted against a defendant, the Confrontation Clause required that the witness be unavailable and that the defendant have had a prior opportunity to cross-examine that witness. *See* 541 U.S. at 54, 68 (emphasis added).

But here Hanson testified at trial and in all likelihood would have done so in a separate trial. *Crawford* therefore does not apply. *See id.* at 53–54 (discussing the constitutional requirements for admitting "testimonial statements of a witness who did not appear at trial"). In fact, "none of [the Supreme Court's] decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial." *California v. Green*, 399 U.S. 149, 161, 162 (1970); *accord, e.g., Ohio v. Roberts*, 448 U.S. 56, 65 (1980) ("In the usual case (including cases where prior cross-examination has occurred), the prosecution must *either* produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." (emphasis added)),

abrogated on other grounds by Crawford v. Washington, 541 U.S. 36 (2004); *State v. Eldredge*, 773 P.2d 29, 33 (Utah 1989) (concluding that admitting child's out-of-court accusation did not violate defendant's confrontation rights because child testified at trial and was cross-examined). Nay had the opportunity to confront Hanson face-to-face and to cross-examine her at trial, just as he would have if she testified in a separate trial. Nay's constitutional right to confrontation was therefore secure.

Nay's arguments under *Bruton* fare no better. There, the U.S. Supreme Court held that, despite curative jury instructions, a defendant's confrontation rights were violated in a joint trial when the prosecutor adduced a confession from a non-testifying co-defendant that directly implicated the defendant. *Bruton*, 391 U.S. at 124–26; *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (limiting *Bruton* to statements expressly implicating defendant). In later cases, the Supreme Court made explicit what was implicit in *Bruton*: Admitting a co-defendant's out-of-court statements against a defendant implicates the Confrontation Clause only when the co-defendant does not testify at trial. *Nelson v. O'Neil*, 402 U.S. 622, 626, 629–30 (1971); *see also Richardson*, 481 U.S. at 206 ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other *unless the confessing defendant takes the stand.*" (emphasis added)); *Bruton*, 391

U.S. at 128 (noting that co-defendant was not subject to cross-examination "since [he] did not take the stand").

For example, in *Nelson v. O'Neil*, the Supreme Court found no confrontation violation when (1) a co-defendant admitted his involvement and implicated the defendant in a statement to a police officer; (2) the officer testified about the confession at trial; and (3) the co-defendant took the stand, denied making the statement, "vigorously asserted" that the substance of it was false, and presented an alibi consistent with the defendant's. 402 U.S. at 624, 629–30. The Court concluded that, because the defendant had the opportunity to cross-examine his co-defendant on the witness stand, the defendant's confrontation rights were not violated. *Id.* at 629–30. It did not matter that the defendant chose not to cross-examine his co-defendant, particularly in light of the favorable testimony presented by the co-defendant. *Id.* at 624, 629. The Court further stated that "the absence of the defendant at the time the codefendant allegedly made the out-of-

court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial." *Id.* at 626.[10]

This case is indistinguishable from *Nelson*. After Officer Jenkins testified about Hanson's confession, Hanson took the stand and declared that she could not remember the confession and adamantly denied the substance of it. Hanson then mirrored Nay's testimony by stating that Chad was solely responsible for the marijuana. Nay was "fully free" to cross-examine Hanson—either about the out-of-court statement or the underlying events—but he had no reason to do so because her in-court testimony was favorable to him on both accounts. *See id.* at 624. Once Hanson took the stand at trial, use of her out-of-court statement became an evidentiary issue, not a constitutional one.

This Court's opinion in *Pham* also illustrates the point. Although *Pham* did not directly address the Confrontation Clause issue, it acknowledged the inapplicability of *Bruton* when a co-defendant testifies in a joint trial. Pham had argued before trial "that a joint trial would result in

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[10] Although *Nelson* stated that the co-defendant's confession was admissible only as to the co-defendant and not as to the defendant, that conclusion was based on state hearsay law. 402 U.S. at 626. As demonstrated above, under Utah law Hanson's confession was not hearsay and thus was admissible against both Hanson and Nay. *See supra* Part B.

injustice because it would pit his Sixth Amendment right to confront [his co-defendant] against [the co-defendant's] Fifth Amendment right to remain silent." *Pham*, 2015 UT App 233, ¶6. But "[b]ecause [the co-defendant] testified at trial," this Court stated that Pham had "*necessarily* abandoned this argument for severance altogether." *Id.* (emphasis added). *See also State v. Ellis*, 748 P.2d 188, 190 (Utah 1987) (describing *Bruton* as governing the use of "extrajudicial statements made by a *nontestifying* codefendant" (emphasis added)).

But even if the potential for a confrontation violation existed, that potential would not have been obvious to the trial court before trial, particularly where no one suggested that Hanson would *not* testify. *See Dunn*, 850 P.2d at 1208 (requiring error to be obvious for relief under plain error). Moreover, as noted, Hanson's confession would have been admissible against her in her own separate trial as a statement against a party-opponent. *See* Utah R. Evid. 801(d)(2)(A) (providing that out-of-court statement is not hearsay if "offered against an opposing party" and "made by the party in an individual or representative capacity"). In the face of that admissible confession, Hanson likely would have taken the stand and given the testimony she gave at the joint trial—that she could not remember making the confession and that it was not true. The State could then call her

to testify in Nay's separate trial, where the substance of her out-of-court confession could come in either through Hanson herself or through Detective Jenkins. Thus, it would not have been obvious to the trial court that joining the cases for trial would have prejudiced Nay.

Nay further argues that he was prejudiced by joinder because Hanson "was not subject to significant cross-examination given [her] diminished perception of the events at the time based on her drug-usage infirmity." Aplt. Br. at 33–36. But when a witness testifies at trial, a defendant's confrontation rights are not violated when—like here—the witness claims memory loss or testifies in a manner inconsistent with her out-of-court statement. *See United States v. Owens*, 484 U.S. 554, 557–60 (1988); *Green*, 399 U.S. at 167–68. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). For a defendant to show an inadequate opportunity to cross-examine a *testifying* witness, he would have to show trial court action that in some way "limit[ed] the scope or nature of defense counsel's cross-examination." *See id.* at 19. It is not enough to show that a "lapse of memory" acted as an inherent impediment on "one method of discrediting" the witness. *See id.* Indeed, through cross-examination, a

defendant may use a witness's lack of memory to undermine her out-of-court statements. *Owens*, 484 U.S. at 559–60; *Fensterer*, 474 U.S. at 19–20. That the cross-examination was ultimately unsuccessful at persuading the jury does not render the opportunity constitutionally deficient. *Owens*, 484 U.S. at 560.

For example, in *United States v. Owens*, the Supreme Court held that the accused enjoyed a full opportunity to cross-examine a testifying witness about an out-of-court identification despite that witness's inability to recall the underlying events that formed the basis of his identification. 484 U.S. at 556, 559–60. And in *California v. Green*, the Supreme Court found no violation of the Confrontation Clause when the prosecution called a witness who could not remember the event in question due to drug use and then presented the witness's prior statements. 399 U.S. at 151–52, 167–68. The Court explained that once a witness has been produced at trial, regardless of whether that witness "then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case." *Id.* at 167–68.

Nay had a full opportunity to confront and examine Hanson about her confession to Detective Jenkins and her lack of memory.[11] The trial court did not limit the scope or nature of Hanson's examination. Indeed, defense counsel elicited favorable testimony from Hanson and fully explored her lack of memory. R304:296-300. Nay has made no showing that a separate trial would have proceeded any differently.

In short, because Nay had the "opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact," *Green*, 399 U.S. at 156—and would have had the same opportunity in a separate trial—joinder did not plainly deny Nay a fair trial.[12]

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[11] As noted, *see supra* note 7, the fact that defense counsel questioned Hanson through direct and re-direct examination rather than cross-examination does not negate the opportunity to cross-examine Hanson, because defense counsel was "fully free to do so." *Nelson*, 402 U.S. at 624.

[12] Nay also briefly casts his memory-loss argument in terms of availability. *See* Aplt. Br. at 33 (arguing that, due to Hanson's inability to recall the confession, in a severed trial Hanson "may have been deemed unavailable as a witness . . . with regard to the content of her interviews with Jenkins"). Nay cites no supporting authority, and Supreme Court precedent forecloses his argument. Unavailability is a prerequisite to admitting an *absent* witness's testimonial statements. *Crawford*, 541 U.S. at 45, 54, 68. Hanson was not and would not be an absent witness.

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3. Defendants' testimonies did not plainly violate rules 402 or 403.

Defendants' second unpreserved argument also lacks merit. Defendants argue that they were prejudiced by joinder because in separate trials, their codefendant's testimonies would be irrelevant, confusing, and misleading and thus inadmissible under rules 402 and 403. But Defendants have again failed to demonstrate error, let alone plain error. Each co-defendant's testimony was relevant to determining their own and the other's culpability and did not confuse or mislead the jury.

Nay first argues that statements Hanson and Chad made about their own culpability were irrelevant to Nay's culpability. Aplt. Br. at 25–26. *See* Utah R. Evid. 402. He acknowledges that Hanson and Chad made statements exculpating Nay, but he asserts that the jury did not believe that exculpatory testimony because Hanson's and Chad's credibility was undermined when they inculpated themselves. Aplt. Br. at 26.

Buried in his Confrontation Clause argument, Nay also mentions Hanson's faulty memory in terms of her competence to testify. Aplt. Br. at 31–32, 35. But Nay acknowledges that witnesses are competent to testify unless the Utah Rules of Evidence provide otherwise. Aplt. Br. at 31. *See* Utah R. Evid. 601. Nay does not identify—let alone develop any argument based on—any rule that would render Hanson incompetent to testify. He has therefore failed to carry his burden on appeal, and this Court should not address the issue. *See* Utah R. App. P. 24(a)(9); *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).

In fact, Hanson made no inculpatory statements at trial. To the extent Nay is referring to her out-of-court confession, that statement was admissible, as demonstrated above. And the relevance of Hanson's confession—at least the part inculpating Nay—is not disputed. Even assuming the part of the confession relating only to Hanson's and Chad's involvement was irrelevant, its admission could have had little impact in light of the statement directly inculpating Nay.

But Nay is wrong that one co-defendant's culpability is irrelevant to another's. "Evidence is relevant if . . . it has *any* tendency to make a [material] fact more or less probable than it would be without the evidence . . . ." Utah R. Evid. 401 (emphasis added). By its terms, rule 401 establishes "a very low bar that deems even evidence with the slightest probative value relevant and presumptively admissible." *State v. Richardson*, 2013 UT 50, ¶24, 308 P.3d 526 (internal quotation marks omitted). When three people are detained in a house strewn with marijuana, any one person's acceptance or denial of responsibility makes the remaining persons' culpability more probable or less probable. For example, when Chad said that he alone was responsible for the marijuana, his statement not only inculpated himself, the statement—if believed—also made it less likely that Nay or Hanson were responsible. Thus, any

witness's self-inculpating statement was relevant to each co-defendant's culpability.

Hanson makes a related argument. She claims that Nay's statement that he "was simply a user and not involved" in the production or distribution of drugs was irrelevant to her culpability. Aplt. Br. at 26. Again, one person's denial of responsibility—if believed—would increase the chances that the remaining two people were culpable. Thus, Nay's testimony exculpating himself was relevant to Hanson and did not render the trial court's joinder ruling plainly erroneous. Indeed, Hanson implicitly acknowledges the relevance of Nay's testimony to her case when, in the same sentence where she labels it irrelevant, she states that Nay's testimony would make it appear more probable "that she was providing [marijuana] to outsiders as a distributer." Aplt. Br. at 26.

Defendants also argue in passing that the joint trial led to the confusion of issues and misled the jury. Aplt. Br. at 25–26; *see* Utah R. Evid. 403. Defendants have not carried their burden of explaining how jointly trying them confused or misled the jury. To carry their burden on appeal, appellants must not only cite legal authority but also develop that authority and present "reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998); *see also* Utah R. App. P. 24(a)(9). Defendants

assert in a subheading that joinder misled the jury "and resulted in confusion of the charges against each separate individual." Aplt. Br. at 21 (formatting and capitalization omitted). The only charge unique to Hanson was possession of a firearm by a restricted person. But Defendants nowhere suggest in their brief that the firearm charge was a basis for the alleged confusion. Aplt. Br. at 20–27. Nor could they. The testimony about the firearms was limited to Hanson—they were, after all, discovered in her bedroom—and the jury instructions and verdict forms clearly differentiated between which charges applied to which defendants. R210, 213–14, 216–17, 222–23, 239–40; R304:21–27, 329; R(Hanson)248–49.

Nay further argues that Hanson's and Chad's testimony "would confuse the jury as to which defendant committed which crime"—all to Nay's detriment because Nay was less culpable than Hanson.[13] Aplt. Br. at

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[13] Defendants stated below, in passing, that the two co-defendants had varying levels of culpability. *See* R133 ("However, it could be argued that co-defendant, Tracy L. Hanson, had a closer connection and more culpability to the alleged controlled substances located in her residence."). But they did not preserve that argument. The statement appears from the briefing below to relate to the participation prong of the joinder analysis, R133–34, which Defendants do not challenge on appeal. But to the extent Defendants offered it below in relation to the prejudice prong, they did not develop that argument or explain its relevance. A "passing reference" that a party "completely fail[s] to pursue or develop" does not preserve an issue for appeal. *See State v. Quintana*, 826 P.2d 1068, 1069 (Utah Ct. App. 1991).

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26. To the extent that Nay refers solely to the drug-related charges and not to the firearm charge, his argument presumes what the jury verdict forecloses. The jury convicted Nay and Hanson of the same drug-related charges, and Defendants have not challenged the sufficiency of the evidence supporting that conviction. Thus, any analysis must proceed from the undisputed starting point that Nay was in fact guilty of the same crimes that Hanson committed. Bald, conclusory assertions aside, Defendants have done nothing to show that the jury was confused or misled into reaching that decision or that Defendants were otherwise deprived of a fair trial. *See Thomas*, 961 P.2d at 305. And in fact, there was nothing confusing about Nay's, Hanson's, and Chad's testimonies. They uniformly pointed to Chad as the sole culprit. The jury simply did not believe it.

In short, the trial court did not err—let alone obviously err—by joining the cases for trial.

On appeal, Nay does not mention the supposed varying degrees of culpability between the two Defendants as an independent basis for relief. Rather, he mentions it only to illustrate why he believes that the allegedly irrelevant, misleading, or confusing testimony prejudiced him. Because Nay never presented that argument to the trial court in a manner that gave the court an opportunity to rule on it, it is unpreserved. *See Houston*, 2015 UT 40, ¶19.

D. Because the evidence of Defendants' guilt was overwhelming, any alleged error was harmless.

Even if it were error to join the trials, any error was harmless because there is no reasonable likelihood of a different result had the cases been severed. *See State v. Bond*, 2015 UT 88, ¶44, 361 P.3d 104. Although Nay argues that Hanson's confession was the only evidence of his guilt, Aplt. Br. at 38, Nay ignores the mountain of additional evidence adduced in this case.

When the police arrived to execute the search warrant, Nay was smoking a joint in a house overspread with marijuana. R303:23–24, 32–33, 38, 41–47, 50; R304:6–7, 11, 43, 49–50, 136–37, 140, 277, 299–300. The police found Nay in a room that had all the necessary implements to prepare marijuana for distribution: a digital scale, two bowls with marijuana residue, two large bags of marijuana, and several smaller bags in which to divide the marijuana. And the police found three glass quart jars of marijuana in Nay's backpack, directly tying him to the illegal activity of preparing the marijuana for distribution. R303:24. Regardless of the story put forth by Nay, Hanson, and Chad to explain away this evidence, the jury reasonably interpreted the evidence as proof that Nay actively participated not only in smoking the marijuana, but also in packaging and preparing it

to sell. In the face of that evidence, any error in joining the trials was harmless as to the charges against Nay.[14]

The evidence against Hanson is even stronger. It was, after all, her house. With marijuana in plain sight, turning up in drawers in her kitchen and bedroom, and growing in her basement, neither Nay's nor Chad's statements about their own culpability were likely to sway the jury that Hanson had nothing to do with the marijuana. The evidence of Hanson's involvement in the marijuana production and distribution was overwhelming. Any error therefore would have also been harmless as to Hanson.

CONCLUSION

Because all the evidence admitted in the joint trial would have been admissible in separate trials, Defendants were not prejudiced by joinder. Accordingly, this Court should affirm.

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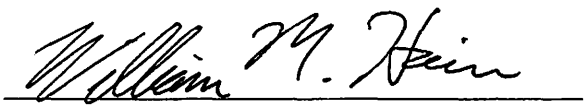
[14] Admittedly, Nay's connection to the marijuana growing in the basement is not as strong. But the jury reasonably could have relied on the overwhelming evidence that Nay, Hanson, and Chad were all involved in a joint enterprise. The jury reasonably could have inferred from Nay's full involvement in every other aspect of that enterprise that he was also aware of and involved in growing the marijuana with his cousins. *Cf. State v. Nickles*, 728 P.2d 123, 126 (Utah 1986) ("[I]t is a well-settled rule that circumstantial evidence alone may be sufficient to establish the guilt of the accused.").

Respectfully submitted on March 28, 2016.

SEAN D. REYES
Utah Attorney General



WILLIAM M. HAINS
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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 9,282 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

WILLIAM M. HAINS
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on March 28, 2016, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

Kenneth L. Combs
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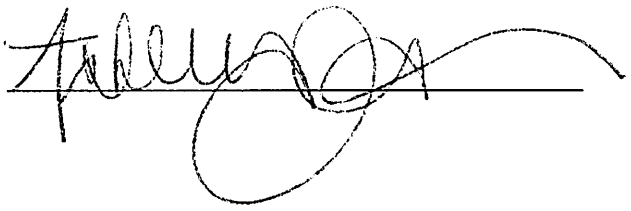
Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

§ 77-8a-1. Joinder of offenses and of defendants

(1) Two or more felonies, misdemeanors, or both, may be charged in the same indictment or information if each offense is a separate count and if the offenses charged are:

(a) based on the same conduct or are otherwise connected together in their commission; or

(b) alleged to have been part of a common scheme or plan.

(2)(a) When a felony and misdemeanor are charged together the defendant is afforded a preliminary hearing with respect to both the misdemeanor and felony offenses.

(b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or conduct or in the same criminal episode.

(c) The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(d) When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion on motion or otherwise orders separate trials consistent with the interests of justice.

(3)(a) The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information.

(b) The procedure shall be the same as if the prosecution were under a single indictment or information.

(4)(a) If the court finds a defendant or the prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information or by a joinder for trial together, the court shall order an election of separate trials of separate counts, grant a severance of defendants, or provide other relief as justice requires.

(b) A defendant's right to severance of offenses or defendants is waived if the motion is not made at least five days before trial. In ruling on a motion by defendant for severance, the court may order the prosecutor to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

Utah R. Evid. 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Addendum B

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St George, UT 84770

IN THE SIXTH DISTRICT COURT OF
SEVIER COUNTY,STATE OF UTAH

STATE OF UTAH, Plaintiff V MICHAEL L NAY, Defendant And TRACY L HANSON	(((((((	OBJECTION TO MOTION TO JOIN AND MEMORANDUM CASE NO. 121600009 CASE NO. 121600010 Judge _____

Comes now, the Defendants, by and through their attorney, Kenneth L Combs, who does hereby object to the State's Motion to Join the defendants' cases in this matter and would show the court as follows:

BACKGROUND

1. The state's rendition of the state's allegations are substantially correct as derived from law enforcement reports including the most concerning piece of evidence, that of the alleged confession of defendant, Tracy L Hanson.
2. The co-defendant, Chad Hanson, has resolved his case by a global plea agreement.

POINTS AND AUTHORITIES

I. Section 77-8a-1 (2012) of the Utah Code governs the issues raised in State's motion to join and sets for a two-step process for determining joinder. For purposes of this objection and with regard to the first step the defense concedes that the defendants are

alleged to "participated in the same act or in the same criminal episode". However, it could be argued that co-defendant, Tracy L Hanson, had a closer connection and more culpability to the alleged controlled substances located in her residence.

II. Further, the state alleges that all evidence in the trial of one defendant would be admitted in the trial of the second. It is clear that the state would attempt to introduce the same evidence in both trials including hearsay statements of the each co-defendant. Defense would attempt to prevent such hearsay statements. Further, in a trial involving only Tracy Hanson the state's efforts to admit her alleged confession as set forth in the states's motion would be successful; however, in a separate trial involving Michael Nay the defense would be successful in excluding Ms Hanson's alleged confession. Accordingly, joining these two cases would in fact prejudice certainly Mr Nay but also potentially Ms Hanson if he were to turn and attack the accuracy of Ms Hanson's alleged incriminating statements.

III. It is upon the second step that the state's motion should clearly be denied. Section 77-8a-1 (2012) of the Utah Code sets forth in relevant part that if the court finds that a defendant is prejudiced by joinder then it should order separate trials. The defendants will be prejudiced by the joinder that the state requests. Although the state correctly cites a few cases suggesting that simply because one

defendant would give exculpatory evidence for the other, or antagonistic testimony or finger pointing against the other defendant does not always defeat a motion to join, those cases are not on point. In the instant cases, the fact that the co-defendant, Tracy Hanson, made an alleged confession should be enough to defeat the State's motion. Here, Defendants assert that their defenses will be antagonistic and that those antagonistic defenses are irreconcilable and mutually exclusive. For purposes of analysis on this point the case of State v Telford, 950560-CA (1997) is more helpful to the Court. In that case Telford was convicted of murder and appealed his conviction arguing that the court erred by denying his motion to sever. At trial Telford argued that the co-defendant actually pulled the trigger and forced him to participate. The co-defendant argued that he was not even present at the scene. The Court of Appeals in Telford stated that the defendant and co-defendant's defenses were mutually exclusive because the jury was required to reject one defense in order to believe the other and it determined that the trial court had erred in "refusing to sever the trial." The Court of Appeals in Telford cited Section 77-8a-1 of the Utah Code and stated that the Utah Supreme Court had interpreted this section in State v Collins, 612 P.2d 775, 777 (Utah 1980) as meaning that "doubts concerning prejudice should be resolved by the trial court in favor of

defendant". The Court of Appeals continued by indicating that the Utah Supreme Court stated in State v O'Brien, 721 P.2d 896, 898 (Utah 1986) that "although trial courts 'appear to be reluctant to grant severance' that reluctance is ill-advised and in the long run risks greater expenditure of judicial resources". The Supreme Court continuing stated "Thus, if 'joint defendants have defenses that appear to be inconsistent with or to obstruct or impede each other' trial courts must 'carefully examine' severance requests and 'grant severance when there is any doubt as to prejudice.'" In the instant case, assuming that the court's admits co-defendant's, Tracy Hanson, alleged confession and this is taken as her position then certainly her defense, if any, would be antagonistic and irreconcilable and thus mutually exclusive. Mr Nay's defense would contradict the alleged confession of Ms Hanson. Their defenses are truly antagonistic. They are irreconcilable and mutually exclusive. The joinder of the two cases would be prejudicial to both defendants.

IV. Conclusion. The court should overrule and deny the state's motion to join.

Dated this the 17th day of Feb., 2014.

_____/s/_____

Kenneth L Combs

CERTIFICATE OF SERVICE

This is to certify that on February 18, 2014, I delivered a true and accurate copy of the above and foregoing to Counsel for the State.

_____/s/_____

Kenneth L Combs

Addendum C

SIXTH DISTRICT COURT-RICHFIELD
SEVIER COUNTY, STATE OF UTAH

2014 MAR 17 AM 9:20

CLERK tac

STATE OF UTAH, Plaintiff,	:	MEMORANDUM DECISION AND ORDER
vs. MICHAEL L NAY, Defendant.	:	Case No: 121600009 Judge: WALLACE A LEE Date: March 14, 2014

The State has filed a Motion to Join. The motion has been fully briefed and submitted for decision without hearing.

The Court has carefully reviewed the memoranda supporting and opposing the motion, and agrees with the State.

The Court finds Ms. Hanson and Mr. Nay could have been charged in the same information because they are accused of jointly participating in the same crime, at the same time, as part of the same criminal episode.
Furthermore, virtually all of the evidence would be the same against both defendants.

In addition, the Court is not convinced either defendant would suffer undue prejudice in a joint trial. Defendants have not shown any defense which would be irreconcilable and mutually exclusive.
It is fairly common for co-defendants to blame each other or argue the other defendant is more culpable. The Court finds such antagonistic defenses are not enough to show the prejudice necessary for the Court to order separate trials.
Likewise, it is not enough to merely argue either defendant would have a greater chance for acquittal if tried separately.

Defendants have pointed to only one matter which is potentially prejudicial. Ms. Hanson allegedly made a statement to police which not only confesses to the alleged crimes, but also directly implicates Mr. Nay.
Defendants claim this statement alone is unduly prejudicial. The Court disagrees. The Court finds whether the cases are joined for trial or not, this statement could be admitted in evidence. If Mr. Nay is tried separately, the State could certainly subpoena Ms. Hanson to testify. If she testifies inconsistently with her prior statement, the State would almost certainly be able to confront her with the prior inconsistent statement.
Therefore, the Court sees no undue prejudice if the statement is introduced in a joint trial.

Finally, the Court finds, contrary to the argument on the last page of defendants opposing memorandum, because Ms. Hanson's statement to the police is allegedly a confession, this statement is no defense. It is hard for the Court to see how Ms.
Hansen could possibly take a position or present a defense at trial consistent with her statement to police, without incriminating herself. Therefore, the fact that Mr. Nay would

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likely attempt to contradict Ms. Hanson's statement at trial, does not constitute mutually exclusive, irreconcilable defenses. To the Court, such an argument appears to be nothing more than typical finger pointing or arguing the other defendant is more culpable.

This potential conflict is not sufficient to require separate trials.

On this basis, the State's Motion to Join is GRANTED.

Date: 3/17/14

Judge WALLACE A LEE
as authorized
Samara A. Carter

STATE OF UTAH
DISTRICT COURTS
SEVIER

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 121600009 by the method and on the date specified.

BY HAND: DALE P EYRE

EMAIL: KENNETH L COMBS

Date: 03/17/2014 /s/ TAMARA CARTER

Deputy Court Clerk

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